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Nos. 79-1738 and 80-945

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

RICHARD NIXON,
Petitioner,

v.

A. ERNEST FITZGERALD,
Respondent.

BRYCE N. HARLOW and
ALEXANDER P. BUTTERFIELD,
Petitioners,

v.

A. ERNEST FITZGERALD,
Respondent.

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONERS HARLOW AND BUTTERFIELD

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I. PETITIONER ADMITS THAT THE "BASIC FACTS" ARE NOT CONTROVERTED, AND BECLOUDS THE LEGAL ISSUES WITH IRRELEVANT ASSERTIONS.

As he has done during the course of this eight-year old lawsuit, respondent Fitzgerald has taken bits and pieces of evidence out of context in an attempt to obscure the legal issues and to argue the merits of his claim. The merits of his claim — that there was a far-flung conspiracy to oust him from his Air Force position — are not at issue in this appeal. Nevertheless, Fitzgerald attempts to show, for example, that he had an excellent record in the Air Force and that (despite the Civil Service Commission finding directly to the contrary) the Nixon administration retaliated against him for his Congressional testimony. Resp. Br. at 2-4.[1] These arguments totally miss the point. Even if it were true that the Air Force did indeed conspire against him and retaliate by eliminating his job, that would be wholly irrelevant to the claims of official immunity and the denial of the cause of action argued by petitioners Harlow and Butterfield.

Specifically, the facts of the case are irrelevant to petitioners' claim of absolute immunity, except insofar as they bear on the threshold requirement that petitioners did not act outside of the "outer perimeter of [their] line of duty." *Barr v. Matteo*, 360 U.S. 564, 575 (1959). Admittedly, however, the facts are relevant to petitioners' claim that on this record they are entitled to qualified immunity as a matter of law. But even here the only pertinent question is whether there exists any material issue of fact as to the absence of malice on petitioners' part.

Significantly, in the opening pages of his brief, Fitzgerald concedes the correctness of petitioners' position when he acknowledges that "[t]he basic facts of this case are not significantly controverted." Resp. Br. at 2. Since the "basic facts" he lists (*id.*) do not indicate liability on the part of petitioners Harlow and Butterfield, and since he offers no evidence that

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[1] This reply brief follows the citation form used in the Brief for Petitioners Harlow and Butterfield. *See* Pet. Br. at 1 n.1.

does indicate liability, respondent's comment amounts to an admission that petitioners' motion for summary judgment should have been granted, because there are no facts left to be determined at a trial.

In an attempt to show that petitioners' summary judgment motion should not have been granted, Fitzgerald is forced to ignore the following uncontroverted "basic facts":

1. Harlow never ordered, directed or approved that Fitzgerald be fired or that he not be rehired.

2. In response to inquiries from Secretary of the Air Force Seamans, Harlow merely said that Congressional relations would be adversely affected were Fitzgerald's job to be abolished.

3. Butterfield never had any contact with the Department of the Air Force, the Department of Defense or President Nixon with respect to the Fitzgerald matter. He became involved only *after* Fitzgerald's job had been eliminated.

4. Butterfield's involvement consisted of recommending to his immediate superior on two occasions, in response to inquiries, that Fitzgerald not be rehired. His advice, in any event, was evidently ignored, since White House officials did make a serious effort to find Fitzgerald another position.

Since, as further discussed below, there is no evidence either that petitioners had any part in the Air Force decision to eliminate respondent's job or that connects them with whatever injury Fitzgerald has suffered, it follows *a fortiori* that respondent's claim of malice or bad faith on their part is baseless.

The purpose of the following factual discussion is not to try the merits of the case, but simply to enable the Court to understand clearly the context in which it is considering the significant legal issues.

"Evidence" With Respect to Harlow.

Respondent has built his entire claim against Harlow on four brief conversations that the latter had with Air Force Secretary Seamans.[2] But in thousands of pages of depositions and exhibits there is not a speck of evidence to suggest that in any of these conversations Harlow in any way advised, approved or assisted in the elimination of Fitzgerald's job.[3] Respondent does not dispute that it was Seamans rather than

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[2] The first two conversations took place on May 9 and May 15, 1969. J.A. 150a-54a, 173a. The third and fourth conversations were held in November and December of 1969 (J.A. 157a-58a, 166a-68a), after Seamans' November 3 termination decision. J.A. 166a. It is undisputed that after the May 9 conversation, Harlow's aide Lamar Alexander counselled Seamans "not to [eliminate Fitzgerald's job] at that time." J.A. 152a. The second conversation took place at a White House breakfast for Congressmen. J.A. 113a-14a, 153a-54a, 162a-65a. Respondent insinuates that there must have been something incriminating in this conversation because it "was more than a 'happenstance' meeting" since "Seamans called [Harlow] out of a very important meeting to talk about the Fitzgerald matter." Resp. Br. at 5 n.7. First, the meeting was hardly "very important": as noted, it was a routine White House breakfast for Congressmen. J.A. 113a-14a, 163a. Second, Seamans' and Harlow's testimony that their meeting at breakfast was solely by "happenstance" is nowhere contradicted in the record. Even if their meeting was not by chance, there still is not a shred of evidence suggesting that Harlow approved, authorized, or gave instructions as to the Air Force's decision on Fitzgerald's job.

Respondent intimates that Harlow offered Seamans advice "'as to timing + how to proceed.'" Resp. Br. at 4. Respondent is quoting handwritten notes made by a White House staff member more than three years after the Harlow-Seamans conversation. The source of the information stated in the notes is unknown, and their author (David Wilson, a White House attorney) had no personal knowledge of the matter, since he did not even join the White House staff until 1971, two years after the conversation about which the notes were written. The unreliable nature of these notes was spelled out quite clearly in petitioners' Reply Brief (dated March 13, 1981) in response to respondent's Brief in Opposition to the *certiorari* petition (Pet. Rep. Br. at 5 & App. A), and it is surprising that respondent continues to rely on it here.

[3] This lack of evidence as to any involvement by Harlow in the decisions regarding Fitzgerald's job is entirely consistent with the fact that, as respondent himself admits, Harlow "had no regular involvement in executive department personnel decisions." Resp. Br. at 41. Indeed, respondent confirms Harlow's non-involvement when he quotes Harlow as testifying that "Mr. Fitzgerald was not my wicket. I was charged with other matters." *Id.*

Harlow who initiated all four conversations and that the third and fourth conversations took place *after* Seamans had already decided to discharge Fitzgerald. In fact, as respondent himself admits, the only "advice" that Harlow ever gave Seamans in any of the four conversations was that "the timing [of Fitzgerald's termination] was wrong." Resp. Br. at 5. On what theory, then, does respondent think Harlow liable? Apparently respondent hopes that a jury will be allowed to make the astounding leap from the fact of the conversations to conclude that because Harlow merely objected to the "timing" of the termination decision, and because he "did not advise Seamans to drop the idea" (*id.* at 5), Harlow must have actually participated in and approved the termination decision.

Respondent also points to the "fact" that Harlow discussed the Fitzgerald matter with President Nixon. *Id.* at 6. Neither Harlow nor President Nixon recalls any such conversation, and there is no record of it in any White House memoranda or presidential activity log. In fact, the only evidence about the alleged 1969 Nixon-Harlow conversation that Fitzgerald can find to support his case (apart from the confused and self-contradictory testimony of Clark Mollenhoff) is Nixon's later recollection that Harlow "was all for canning" Fitzgerald. *Id.* But this quotation appears to support Fitzgerald's case only because he has completely wrenched it out of context. The full exchange is:

> Nixon: Bryce was all for canning him, wasn't he?
>
> Ziegler: No, I think Bryce may have been the other way. [J.A. at 284a.]

Respondent would have a jury conclude from this conversation, which occurred more than three years after both the alleged Nixon-Harlow conversation and Fitzgerald's termination, that Harlow played a part in some ill-defined "conspiracy" to discharge Fitzgerald.

"Evidence" With Respect to Butterfield.

The "evidence" against Butterfield is equally sparse. Respondent has based his entire case against Butterfield on a single telephone conversation and a single memorandum in which Butterfield urged that the administration let respondent "bleed." But it is irrefutable that both the telephone conversation and the sending of the memorandum did not take place until January of 1970, so that there is no question but that they did not in any way contribute to the Air Force's November 1969 decision to eliminate Fitzgerald's position. They also could not possibly have had any causal impact on the asserted failure to rehire Fitzgerald, because it is undisputed that Butterfield's recommendations were never communicated to the Air Force or Defense Departments, and that the White House's unsuccessful efforts to find Fitzgerald another job continued after Butterfield's recommendations were expressed. Without some showing of a causal relationship, an "affirmative link" between Butterfield's telephone call and memorandum and respondent's allegedly wrongful discharge, no jury could permissibly find Butterfield to be liable. *See Rizzo v. Goode,* 423 U.S. 362, 371 (1976) ("affirmative link" between third party's misconduct and defendant's acts must be shown in conspiracy cases); *Henzel v. Gerstein,* 608 F.2d 654, 659 (5th Cir. 1979) (conspiracy allegations that are "wholly conclusory and unsupported . . . cannot withstand a motion for summary judgment").

II. PETITIONERS HARLOW AND BUTTERFIELD WERE ACTING SQUARELY WITHIN THE SCOPE OF THEIR AUTHORITY AND MAY THUS AVAIL THEMSELVES OF ABSOLUTE OR QUALIFIED IMMUNITY.

One of respondent's ways of addressing petitioners' reasoned arguments is to misapprehend the arguments and to restate them in a sufficiently hyperbolic way so that the reader would presumably be repelled by the exaggerated statement. To illustrate, respondent claims that "petitioners Harlow and Butterfield . . . argue that they should be absolutely immune not merely in the traditional sense . . . but rather *for all actions*

while in office." Resp. Br. at 36 (emphasis added). Respondent shrilly warns that "under the doctrine advanced by petitioners, there would be no limit." *Id.* at 37. This is totally untrue. Petitioners expressly acknowledged in their brief (at p. 37) that any form of official immunity that would be accorded them would require that they have been acting "within the outer perimeters of [their] line of duty." *Barr v. Matteo,* 360 U.S. 564, 575 (1959).

Respondent further claims that Harlow and Butterfield were acting outside "the scope of their authority" (Resp. Br. at 34-37, 40-41), by which respondent evidently is referring to the *Barr v. Matteo* "perimeter" test. *Id.* at 41. Harlow and Butterfield were both senior White House advisers, charged in this case with allegedly giving advice and counsel concerning Fitzgerald's discharge. Fitzgerald therefore is asking this Court to hold that senior White House advisers, by giving advice and counsel concerning a matter that had come to their attention, were acting outside "the outer perimeter" of their responsibilities. *Id.* at 35. The absurdity of this proposition is clear. Not only did the Fitzgerald matter fall within "the outer perimeter" of Harlow's and Butterfield's responsibilities, but it also fell squarely within the scope of their daily duties. All senior White House aides are charged with giving their advice and counsel to the President, members of the White House staff, and the executive departments on matters that come to their attention. Harlow was approached by Seamans because Seamans knew that Fitzgerald had become the object of several Congressmen's attention. It was unquestionably Harlow's responsibility to monitor and give advice on matters of Congressional concern and to respond to requests for political assessments — such as whether the firing of an Air Force employee would cause trouble on Capitol Hill.

Butterfield first became involved with the Fitzgerald matter in response to a direct request from his superior to look into Fitzgerald's job status. *See* Pet. Br. at 7-8. It is difficult to conceive of an act that could fall more completely within the scope of one's duties than a recommendation stemming from a direct request of one's superior. Butterfield's recommendation

to his immediate superior — that Fitzgerald not be rehired — was entirely in keeping with White House staff practice and Butterfield's own relationship with his superior, which allowed him full authority to make recommendations on matters brought to his attention.[4] *See* Nixon Dep. I (R. 378) 366-67; Butterfield Dep. (R. 42) 127-30, 134, 137 (J.A. 99a, 100a).

Moreover, the fact that petitioners are alleged to have participated in a constitutional tort, which by definition must have been unauthorized, does not itself compel a denial of immunity. This Court has previously quoted Judge Learned Hand in recognizing the speciousness of such an argument:

> The [court] decisions [on immunity] have, indeed, always imposed as a limitation upon the immunity that the official's act must have been within the scope of his powers; and it can be argued that official powers, since they exist only for the public good, never cover occasions where the public good is not their aim, and hence that to exercise a power dishonestly is necessarily to overstep its bounds. A moment's reflection shows, however, that that cannot be the meaning of the limitation without defeating the whole doctrine. [*Barr v. Matteo, supra,* 360 U.S. at 572, *quoting Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949), *cert. denied,* 339 U.S. 949 (1950).]

Thus, even under a charitable view of plaintiff's allegations, it is clear that Harlow and Butterfield were acting entirely within the scope of their authority.

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[4] Respondent's only "evidence" to support his assertion that Butterfield was acting outside the scope of his authority consists of some statements drawn from a 1973 interview given by Butterfield to journalist Vera Glasser. *See* Resp. Br. at 8-9 n.13. Butterfield's comments belittling his role in the Fitzgerald matter were directed to the point that Butterfield was not normally asked by his superior to get involved in Pentagon personnel decisions. But that does not in any way mean that he was acting outside of the scope of his authority — he was simply expressing his recommendation to his superior on a matter that his superior had asked him to look into.

III. PUBLIC POLICY DEMANDS THAT SENIOR PRESIDENTIAL ADVISERS BE ACCORDED ABSOLUTE IMMUNITY.

Respondent rejects Harlow's and Butterfield's claim to absolute immunity with the cavalier assertion that a President and his senior aides will not be "cowed" by the fear of financial ruin and burdens of litigation that the threat of damage actions necessarily represents. Resp. Br. at 31. In making this assertion, respondent would have this Court ignore its many decisions that recognize the reality of the fears that damage suits can pose, as well as the debilitating impact on the administration of government that those fears can have when they distort the decisions that Presidents and their senior advisers must make. "It simply defies logic and common experience to suggest that officials will not have [the fear of litigation and liability] in the back of their minds when considering what official course to pursue." *Butz v. Economou*, 438 U.S. 478, 526-27 (1978) (Rehnquist, J., concurring and dissenting in part).

Respondent apparently believes, nevertheless, that petitioners have not presented sufficient evidence to demonstrate that the threat of lawsuits would inhibit the actions and distort the decisions that senior White House advisers must make on matters of great public importance each day. Resp. Br. at 26, 31. It is difficult to see what kind of "evidence" respondent would recognize as sufficient. Presumably respondent would not be willing to acknowledge the correctness of according absolute immunity to the judge in *Stump v. Sparkman*, 435 U.S. 349 (1978), unless the judge had announced that he would have ruled differently had he feared an ensuing lawsuit. But as this Court has recognized many times, it is common sense that tells one that, for example, Judge Sparkman's daily decisions would in fact have been influenced by the fear of liability, even if one cannot find a hard piece of evidence that explicitly demonstrates that fact. The fear of liability would have no less of a distorting effect on the recommendations and decisions that Harlow, Butterfield, and other senior White House advisers in

every administration are daily called upon to make in the course of conducting the nation's business.[5]

Indeed, as respondent himself recognizes, it is the need to permit judges, prosecutors, and legislators to govern fearlessly and vigorously, uninfluenced by "the hazards and distractions of collateral civil liability," that provides the basis for extending absolute immunity to those officials. Resp. Br. at 23. The same rationale necessitates extending absolute immunity to senior White House advisers like Harlow and Butterfield, in order that they may vigorously discharge their public duties, rather than govern with one eye on the consequences that each important decision might have on their own personal finances. Qualified immunity has proven in practice to provide insufficient protection to quell the debilitating fear of liability, because the lower federal courts routinely force officials in the same position as petitioners here to face "the burden of a trial and ... the inevitable danger of its outcome". *Gregoire v. Biddle, supra,* 177 F.2d at 581. *See generally* Pet. Br. at 34-35, 40-43.

In yet another mischaracterization, respondent asserts that Harlow and Butterfield are claiming immunity solely on the basis of their rank. Resp. Br. at 23. That is simply untrue. Petitioners agree with respondent that absolute immunity is not just "a privilege of rank or a badge of high office." *Id. See* Pet. Br. at 26. They also agree that the right to absolute immunity depends on the nature of an official's *functions* and whether the

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[5] At Congressional hearings in November 1981 on bills that would make the United States Government the sole defendant (to the exclusion of individual federal officials) in cases involving constitutional torts, the Department of Justice noted that there were over 2,000 such cases (some of which involved multiple defendants) then pending against federal officials: "*Bivens* actions have subjected countless federal employees to vexatious litigation *and encouraged a timid discharge of official duties* because of the fear of lawsuits." Statement of Deputy Attorney General Edward G. Schmults before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary at pp. 3-4 (Oct. 13, 1981) (emphasis added). *Accord,* Griffin Bell, *Proposed Amendments to the Federal Tort Claims Act,* 16 Harv. J. on Legislation 1,6 (1979). *See generally* H.R. 24 and S. 1775, 97th Cong., 1st Sess. (1981).

adequate performance of those functions demands the protection that absolute immunity provides. As was amply discussed in their brief (and thus need not be reiterated here), Harlow and Butterfield plainly performed functions that demand the protection of absolute immunity. *See* Pet. Br. at 31-33. Respondent offers no rebuttal to that discussion. Instead, he is reduced to making sweeping, conclusory assertions. After quoting Justice Frankfurter in *Tenney v. Brandhove*, 341 U.S. 367, 377 (1951), to the effect that Congressmen performing legislative duties are immune "not for their private indulgence but for the public good," respondent states that "[n]o similar rationale can justify a grant of *ex officio* absolute immunity to an executive official, whether state or federal." Resp. Br. at 23-24. As demonstrated in petitioners' brief (at pp. 26-28) and as recognized by this Court in numerous immunity cases, there is indeed a similar rationale — the "constant dread of retaliation" will affect official decison-making — that justifies granting absolute immunity to those whose functions require such protection. *See Gregoire v. Biddle, supra,* 177 F.2d at 581. Unless this Court is willing to countenance the prospect that the judgment of senior Presidential advisers may inadvertently be distorted by fear of their own potential liability, then it should hold that petitioners here perform functions that necessitate the protection of absolute immunity.

Respondent claims, however, that it would be anomalous to hold that the facts of this case present an "exceptional situation" under *Butz v. Economou* for which absolute immunity is essential, since (according to respondent) this Court evidently did not view the disturbance at Kent State University as presenting an "exceptional situation" warranting absolute immunity for the govenor of Ohio. Resp. Br. at 25. *See Scheuer v. Rhodes,* 416 U.S. 232 (1974). Once again, respondent's line of argument reflects a misapprehension of petitioners' position. Petitioners have proposed a balancing test that would attempt to reconcile the official's need for the protection of absolute immunity with the extent to which absolute immunity would leave unredressed a substantial constitutional injury. Pet. Br. at 37-39. From a functional viewpoint, Governor

Rhodes may have had as great a need for absolute immunity's protection as petitioners here, but certainly the degree of the injury and the extent to which the plaintiffs could redress it through means other than a private damages action were far different in the two cases. The deaths that were the subject of *Scheuer* were obviously at the opposite end of the injury scale from the adverse personnel decision suffered by Fitzgerald. Most significantly, the *Scheuer* plaintiffs had no other means to remedy their injury other than by an action for damages. For them, as for Mr. Bivens, "it is damages or nothing." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, supra,* 403 U.S. at 410 (Harlan, J., concurring in the judgment). Clearly that is not the case for Fitzgerald.

Respondent also claims that Harlow's and Butterfield's claim to derivative absolute immunity "amounts to suggesting" that senior White House advisers enjoy absolute immunity but that those who hold "the greater responsibilities of a Cabinet office" do not. Resp. Br. at 25. Petitioners "suggest" nothing of the sort. First, it is not clear that Cabinet officers exercise "greater responsibilities." In view of the difficult duties of a senior Presidential adviser (as explained in petitioners' brief at pp. 31-32), it might well be that, for example, today's Edwin Meese or James Baker has "greater responsibilities" than John Block, one of whose predecessors as Secretary of Agriculture was denied absolute immunity in *Butz v. Economou.*[6] Second,

[6] In any event, although the Court need not reach the issue here, it may well be that some Cabinet officers are, depending upon their functions, entitled to absolute immunity. Indeed, they may even be derivatively entitled to absolute presidential immunity to the extent that they are discharging their constitutional duties to advise the President (as where, for example, the Attorney General advises on the legality of a Presidential action). *See* U.S. Const. art. II, §2. As this Court has noted in other contexts, there are similar constitutional underpinnings in the case of Presidential advisers:

> [There is a] necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decisionmaking .... [T]hose who assist [the President] must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. *These ... considerations*

(footnote continues)

what petitioners do suggest is that because the President cannot act without the help of others, it would mean very little for the President to be given absolute immunity to permit him to discharge *his* duties fearlessly and vigorously if his closest aides are afraid to advise him fearlessly and to carry out his orders vigorously. *See* Pet. Br. at 28-30.

IV. HARLOW'S AND BUTTERFIELD'S INVOLVEMENT WITH THE FITZGERALD MATTER WAS TOO TANGENTIAL TO WARRANT GOING TO A JURY.

As demonstrated by the inferences, conjecture, and speculation that comprise respondent's brief, this very case itself shows how an ingenious plaintiff can concoct a barely plausible theory of causality and liability that forces a trial judge under normal summary judgment rules to let the case go to the jury. *See* Pet. Br. at 43-44. The simple fact is that after protracted litigation, including the taking of many depositions and the production of thousands of pages of documents, respondent has been unable to uncover a shred of evidence to show that Harlow or Butterfield ever participated in or approved the decision to eliminate his job, or that they ever frustrated his rehiring. It was precisely this kind of patently "insubstantial lawsuit" that this Court said should be "quickly terminated" on a motion for summary judgment when the defense of qualified immunity is raised. *Butz v. Economou, supra,* 438 U.S. at 507. Respondent concedes that damages actions against a defendant for injuries in which the defendant played only a "tangential" role should not survive to trial. Resp. Br. at 27.

(footnote continued)

> . . . [*are*] *fundamental to the operation of Government and* [*are*] *inextricably rooted in the separation of powers under the Constitution.* [*United States v. Nixon,* 418 U.S. 683, 705-06, 708 (1974) (emphasis added) (privilege for confidential Presidential communications is subordinate only to specific need in criminal prosecution.]

Respondent has little to say about petitioners' contentions that qualified immunity as envisioned in *Butz* has not proven "workable," and that a higher evidentiary burden should therefore have been required to defeat petitioners' motion for summary judgment on the ground of qualified immunity.[7] *See* Resp. Br. at 30 n.39. *See generally* Pet. Br. at 40-49. Presumably, respondent's relative silence reflects his recognition that he could not possibly meet such a burden. In lieu of the normal summary judgment standard, petitioners have advanced Judge Gesell's suggestion that "the plaintiff must establish after the completion of discovery and before the trial commences, . . . by the preponderance of the evidence or through clear and convincing evidence, that the official failed to act with subjective or objective good faith." Pet. Br. at 45. *See Halperin v. Kissinger*, 606 F.2d 1192, 1215 (D.C. Cir. 1979), *aff'd by an equally divided court*, 452 U.S. — (June 22, 1981) (Gesell, J., concurring). Respondent's only comment is that "[s]erious seventh amendment problems would be raised by the application of a higher evidentiary standard at the pretrial stage than at a jury trial." Resp. Br. at 30 n.39. But there would be no seventh amendment problems because the same evidentiary standard ("preponderance" or "clear and convincing") would be used at the jury stage. No one — petitioners or respondent — has suggested that any *lower* standard be employed at the jury stage.

If petitioners can be forced to trial on as meager a record as this one, the protection that the qualified immunity doctrine was fashioned to afford will be entirely eviscerated. No senior presidential adviser would then ever be able to govern without fear of litigious harassment and financial ruin, because a person aggrieved by a decision in which the adviser might have had some fleeting involvement would often be able to construct

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[7] Respondent claims that this Court may not review the district court's denial of summary judgment on the ground of qualified immunity because the denial was not (according to the respondent) an immediately appealable collateral order. *See* Resp. Br. at 29 n.38. As noted in petitioners' brief (at pp. 20-21 & nn.6 & 7), since the purpose of qualified immunity is (among other things) to avoid a trial on the merits, it should be no less appealable than a denial of absolute immunity. In any event, since the absolute and qualified immunity issues are so interrelated, petitioners respectfully urge this Court, in conformity with its past practice, to consider both issues together. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940).

some theory of liability just as Fitzgerald has done in this case. To prevent the debilitating impact that such a result would have on the administration of government, it should be recognized that the lower courts have in practice been unable to heed this Court's admonition to "weed out insubstantial claims." *Butz v. Economou, supra,* 438 U.S. at 527. Therefore, if petitioners are not held to be entitled to absolute immunity, they respectfully urge this Court to clarify the standards under which summary judgment should be granted and thus give meaning to the defense of qualified immunity.

V. BECAUSE RESPONDENT HAS ALREADY AVAILED HIMSELF OF HIS CIVIL SERVICE REMEDY, THE ADDITIONAL REMEDIES OF IMPLIED CONSTITUTIONAL AND STATUTORY CAUSES OF ACTION ARE UNNECESSARY.

In response to petitioners' argument that respondent is not entitled to the extraordinary remedy of an implied private damages action in addition to his civil service statutory remedies,[8] respondent states that "[e]xecutive discretion in the

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[8] Respondent suggests that the cause of action issue is not properly before the Court, because it was not collaterally appealable. Resp. Br. at 42. For the reasons stated in their brief (at p. 21 n.8), petitioners believe that the cause of action question is now appealable because it is completely intertwined with the immunity issues. There is nothing to prohibit this Court from considering all these interrelated issues together. *See Deckert v. Independence Shares Corp.*, 311 U.S. 282, 287 (1940). Petitioners did not include the cause of action issue in their notices of appeal to the court of appeals because it was not clear at the time in the District of Columbia Circuit that the issue was immediately appealable. However, in a recent immunity case the D.C. Circuit indicated that the question of the existence of a private cause of action for constitutional torts can be immediately appealed in conjunction with an appeal of a denial of absolute immunity:

> Although the District Court's disposition of [the cause of action question] was not a final judgment, [it] nevertheless might be made the subject of review in conjunction with our review of defendants' appeal from the collateral order denying absolute immunity. *See IBM v. Levin*, 579 F.2d 271, 278 (3d Cir. 1978); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468 (8th Cir. 1977); *Deckert v. Independence Corp.*, 311 U.S. 282 (1940). [*Dellums v. Powell*, No. 80-1331, slip op. at 5 n.6 (D.C. Cir. July 24, 1981).]

(footnote continues)

personnel area is broad, but it is not unreviewable." Resp. Br. at 44. Respondent has, once again, missed the point. The issue is not whether executive decision-making in personnel matters is judicially reviewable — of course it is. There are elaborate statutory safeguards protecting the rights of civil servants such as Fitzgerald, and, as he himself has demonstrated several times, decisions made under that statutory scheme are reviewable by the courts. *See* Pet. Br. at 11 n.4 & 24 n.10. Rather, the issue is whether there should be an *additional judicial remedy* allowing him to seek damages from private individuals. Respondent offers no convincing reason why inference of a private cause of action is necessary.

Respondent acknowledges that he would have no implied private action under the First Amendment if there were "special factors counselling hesitation" in inferring such a remedy. Resp. Br. at 42-43. *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 396 (1971); *Carlson v. Green*, 446 U.S. 14, 18 (1980). But he denies that this case presents such "special factors." Admittedly, Congress has not "explicitly declared" that the elaborate panoply of Civil Service remedies (which Fitzgerald actively and successfully pursued) are "a *substitute* for recovery directly under the Constitution." *See Carlson v. Green, supra*, 446 U.S. at 18 (emphasis in original). But in view of the full remedial scheme available to civil servants such as respondent, petitioners respectfully urge this Court to refrain from sanctioning judicial intrusion into the employer-employee relationship between the federal government and its civil servants. Such intrusion would, as the Fifth Circuit recently held in a case very similar to Fitzgerald's, "tend to interfere with and undermine the traditional control of the Government over its internal and personnel affairs." *Bush v. Lucas*, 647 F.2d 573, 577 (5th Cir. 1981), *petition for cert. filed*, 50 U.S.L.W. 3176 (U.S. Sept. 4, 1981) (No. 81-469). The only way to avoid that intrusion in cases

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(footnote continued)

Since the issue was briefed in the trial court, was noted in petitioners' *certiorari* petition (at p. 14 n.9), is now squarely presented, and is "fairly comprised" by the Questions Presented (*see* Sup. Ct. R. 21.1(a)), petitioners respectfully urge the Court to consider the cause of action issue.

such as this is to withhold the plaintiff's constitutional cause of action altogether, and remit him to his Civil Service remedy.

In an attempt to eliminate the adverse impact of *Bush v. Lucas,* respondent claims that the case was just "wrongly decided" or that it is "distinguishable from [respondent's] case, since Congress had not expressly prohibited the conduct challenged" in *Bush.* Resp. Br. at 44. But that reasoning is illogical: if anything, the fact that Congress had not made available statutory remedies and sanctions for a constitutional tort (as respondent claims was true in the *Bush* case) should have given added reason to infer a private remedy for that tort. But since the *Bush* court refused to infer such a remedy under those circumstances, *a fortiori* a private remedy should not be inferred where (as in Fitzgerald's case) Congress has already provided additional statutory remedies. *See generally* Brief for the Respondent in Opposition at 6-12, *Bush v. Lucas, petition for cert. filed,* 50 U.S.L.W. 3176 (U.S. Sept. 4, 1981) (No. 81-469).

Respondent's attempt to assert private statutory causes of action is even more misguided. He claims, without any supporting citation whatsoever, that "Congress apparently intended that a private right of action should be available to vindicate federal employees' rights in the face of official retaliation for congressional testimony." Resp. Br. at 43. Respondent relies on two statutes: one that makes it a felony to injure a Congressional witness (18 U.S.C. §1505), and another that gives civil servants the right to petition Congress (5 U.S.C. §7211). Only one sentence in his entire brief is offered in support of the creation of a cause of action under 18 U.S.C. §1505. The sentence states that the *other* statute (5 U.S.C. §7211) "provides a context that justifies implying a private right of action" under the penal statute. Resp. Br. at 47. The basis of his right to sue, then, must be in §7211. But Fitzgerald admits that §7211 does not directly provide for a private right of action. Indeed, he even expressly admits that the subject of a private right of action was not once "discussed in its legislative history." *Id.* at 44-45. Respondent briefly reviews the legislative history of §7211 and the general statutory scheme; the best he can offer is the contention that the circumstances surround-

ing the enactment of §7211 "strongly suggest that congressional silence concerning a private cause of action should not be construed to deny its existence," and that the subsequent enactment of additional remedies need not necessarily preclude implication of a cause of action. *Id.* at 46-47. However, as noted in petitioners' brief (at pp. 25-26 n.11), the circumstances surrounding enactment of §7211 in 1912 and the subsequent elaboration of remedies make clear that, at least in this instance, Congressional silence actually does bespeak an intent that there be no private cause of action. Without any precedential basis or even inferential support, respondent is essentially asking this Court to indulge in the fiction of uncovering a 69-year old Congressional intent to authorize private damages actions for violations of §7211. There are neither legal nor policy reasons for doing so. In short, respondent's conclusory contentions notwithstanding, there is simply no evidence that Congress intended to provide any remedy other than the Civil Service remedy available for violation of 5 U.S.C. §7211, and the penal sanction available for violation of 18 U.S.C. §1505.

CONCLUSION

The district court's denial of petitioners' motion for summary judgment should be reversed.

Respectfully submitted,

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